UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER III--SPECIAL PROVISIONS RELATING TO RADIO
PART I--GENERAL PROVISIONS

Current through P.L. 104-333, approved 11-12-96

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and market-place demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such

regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that-

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to the enactment of the Omnibus Budget Reconciliation Act of 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall

exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for

relief.

(C) Definitions

For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section--

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

CREDIT(S)

1997 Electronic Pocket Part Update

(June 19, 1934, c. 652, Title III, § 332, formerly § 331, as added Sept. 13, 1982, Pub.L. 97-259, Title I, § 120(a), 96 Stat. 1096; renumbered § 332, Oct. 5, 1992, Pub.L. 102-385, § 25(b), 106 Stat. 1502, and amended Aug. 10, 1993, Pub.L. 103-66, Title VI, § 6002(b)(2)(A), 107 Stat. 393; Feb. 8, 1996, Pub.L.

104-104, § 3(d)(2), Title VII, §§ 704(a), 705, 110 Stat. 61, 151, 153.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1982 Act. Senate Report Nos. 97-191 and 97-404, and House Conference Report No. 97-765, see 1982 U.S.Code Cong. and Adm.News, p. 2237.

1992 Acts. Senate Report No. 102-92 and House Conference Report No. 10-862, see U.S. Code Cong. and Adm. News, p. 1133.

1993 Acts. House Report No. 103-111 and House Conference Report No. 103-213, see 1993 U.S. Code Cong. and Adm. News, p. 378.

1996 Acts. House Report No. 104-204 and House Conference Report No. 104-458, see 1996 U.S. Code Cong. and Adm. News, p. 10.

References in Text

Provisions of part III of Title 5, referred to in subsec. (b)(2) of this section, are classified to section 2101 et seq. of Title 5, Government Organization and Employees.

The Federal Advisory Committee Act, referred to in subsec. (b)(4), is Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in Appendix 2 to Title 5, Government Organization and Employees.

This chapter, referred to in subsec. (c)(1), (2), and (7), was in the original "this Act", meaning Act June 19, 1934, c. 652, 48 Stat. 1064, as amended, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

The enactment of the Omnibus Budget Reconciliation Act of 1993, referred to in subsec. (c)(2), probably means the date of the enactment of Pub.L. 103-66, which was approved Aug. 10, 1993.

The Communications Satellite Act of 1962, referred to in subsec. (c)(4), is Pub.L. 87-624, Aug. 31, 1962, 76 Stat. 419, as amended, which is classified generally to chapter 6 (section 701 et seq.) of this title. Titles III and IV of such Act are classified to subchapters III (section 731 et seq.) and IV (section 741 et seq.), respectively, of chapter 6 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 701 of this title and Tables.

The Omnibus Budget Reconciliation Act of 1993, referred to in subsec. (c)(6), is Pub.L. 103-66, Aug. 10, 1993, 107 Stat. 312. For complete classification of this Act to the Code, see Tables.

Codifications

In subsec. (b)(2), "section 1342 of Title 31" was substituted for "section 3679(b) of the Revised Statutes (31 U.S.C. 665(b))" on authority of Pub.L. 97-258, 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

Amendments

1996 Amendments. Subsec. (c)(7). Pub.L. 104-104, § 704(a), added par. (7).

Subsec. (c)(8). Pub.L. 104-104, § 705, added par. (8).

Subsec. (d)(1), (3). Pub.L. 104-104, § 3(d)(2), substituted "section 153 of this title" for "section 153(n) of this title".

1993 Amendments. Catchline. Pub.L. 103-66, § 6002(b)(2)(A)(i), substituted "Mobile services" for "Private land mobile services".

Subsec. (a). Pub.L. 103-66, § 6002(b)(2)(A)(ii), substituted "private mobile services" for "private land mobile services" wherever appearing.

Subsec. (b)(1). Pub.L. 103-66, § 6002(b)(2)(A)(ii), substituted "private mobile services" for "private land mobile services".

Subsec. (c). Pub.L. 103-66, § 6002(b)(2)(A)(iii), added par. (1), struck out former par. (1) which defined private land mobile service, in par. (2) added provision authorizing termination of prohibition in public interest, in par. (3) added provisions authorizing and setting forth procedures for petition for State regulation of commercial mobile services, and added pars. (4) to (6).

Subsec. (d). Pub.L. 103-66, § 6002(b)(2)(A)(iii), added subsec. (d).

Effective Dates

1993 Acts. Section 6002(c) of Pub.L. 103-66 provided that:

"(1) In general.--Except as provided in paragraph (2), the amendments made by this section [amending sections 152, 153, 309, and 332 of this title and enacting provisions set out as notes under sections 309 and 332 of this title] are effective on the date of enactment of this Act [Aug. 10, 1993].

"(2) Effective dates of mobile service amendments.--The amendments made by subsection (b)(2) [amending sections 152, 153, and 332 of this title] shall be effective on the date of enactment of this Act [Aug. 10, 1993], except that--

"(A) section 332(c)(3)(A) of the Communications Act of 1934 [section 332(c)(3)(A) of this title], as amended by such subsection, shall take effect 1 year after such date of enactment; and

"(B) any private land mobile service provided by any person before such date of enactment, and any paging service utilizing frequencies allocated as of January 1, 1993, for private land mobile services, shall, except for purposes of section 332(c)(6) of such Act [section 332(c)(6) of this title], be treated as a private mobile service until 3 years after such date of enactment."

Availability of property

Section 704(c) of Pub.L. 104-104 provided that: "Within 180 days of the enactment of this Act [Feb. 8, 1996], the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and

easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes."

Transitional Rulemaking for Mobile Service Providers

Section 6002(d)(3) of Pub.L. 103-66 provided that: "Within 1 year after the date of enactment of this Act [Aug. 10, 1993], the Federal Communications Commission--

"(A) shall issue such modifications or terminations of the regulations applicable (before the date of enactment of this Act [Aug. 10, 1993]) to private land mobile services as are necessary to implement the amendments made by subsection (b)(2) [amending sections 152, 153, and 332 of this title];

"(B) in the regulations that will, after such date of enactment, apply to a service that was a private land mobile service and that becomes a commercial mobile service (as a consequence of such amendments), shall make such other modifications or terminations as may be necessary and practical to assure that licensees in such service are subjected to technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services;

"(C) shall issue such other regulations as are necessary to implement the amendments made by subsection (b)(2) [amending sections 152, 153, and 332 of this title]; and

"(D) shall include, in such regulations, modifications, and terminations, such provisions as are necessary to provide for an orderly transition."

47 U.S.C.A. § 332

47 USCA § 332

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THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Timothy E. McKee, Chair
Susan M. Seltsam
John Wine

In the Matter of a General Investigation Into Competition within the Telecommunications Industry in the State of Kansas.	))))	Docket No. 190,492-U 94-GIMT-478-GIT

ORDER ON RECONSIDERATION

NOW the above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being duly advised in the premises, the Commission finds and concludes as follows:

I. Background

1. On December 27, 1996, the Commission issued an order in the above captioned docket.

2. On January 14, 1997, the following parties filed petitions for reconsideration: Southwestern Bell Telephone Company (SWBT), The Citizens' Utility Ratepayer Board (CURB), Kansas City Fiber Network and Multimedia Hyperion Telecommunications (KC Fiber), AT&T Communications of the Southwest, Inc. (AT&T), Sprint Spectrum, L.P., CMT Partners (CMT), Independent Telecommunications Group (Columbus) and the State Independent Alliance, Mercury Cellular, and Mountain Solutions, Inc. Mercury Cellular filed a petition for reconsideration although it was not a party to the docket. The Commission is unable to consider petitions for reconsideration from non-parties. K.A.R. 82-1-225.

However, the issues raised by Mercury were raised by other parties and were considered.

3. On January 24, 1997, SWBT filed a response to several of the petitions for reconsideration.

4. On December 12, 1997, the Commission received by letter Council Grove Telephone Co.'s acceptance of the Independent Telephone Company Stipulation and Agreement. On August 23, 1996, Mountain Solutions, Inc. filed an application to intervene On September 12, 1996, the Commission issued an order granting Mountain Solutions, Inc. intervention. The Order should be amended to include Mountain Solutions, Inc. as a party.

II. Discussion

5. The petitions for reconsideration will be addressed on an issue-by-issue basis.

A. Price Cap Issues

6. Productivity Factor: SWBT and CURB request reconsideration of the productivity offset (X-factor), of 3 %, established in the December 27, 1996 Order. SWBT asserts the X- factor set in the Order is too high for the following reasons:

a. Empirical evidence demonstrates the nationwide TFP differential is 2.2-2.5%. The average offset is 2.2% in states with infrastructure requirements.

b. Adoption of a 3% factor fails to balance efficiency and investment as required by the State Act, and will constrain investment, jobs and economic development in the state.

c. Unrebutted evidence shows that inter and intra-state access services have much higher growth rates than the intrastate services that are subject to the price cap.

d. The 0.4 input price differential adopted by the Commission was not subject to cross-examination because the Selwyn/Kravtin studies supporting it were only produced at the very end of the proceeding. SWBT includes information that the California PUC found that the input price differential in the Kravtin/Selwyn study lacked support in the evidence and was not statistically different from zero. SWBT adds that the last 5 years of data in the study showed a 0.5 % greater LEC input price growth than for the general economy.

e. Recent interexchange carrier price increases are an indication of increased costs and manufacturers have announced a 15% increase in the cost of fiber optic cable. The State Act requires fiber connection between central offices.

f. The adoption of a competitive services subbasket and the failure to automatically deregulate price when there is one alternative provider, as well as the service by service imputation requirement constrain SWBT and require a lower TFP factor.

7. CURB's reconsideration petition asserts that the productivity factor is too low for the following reasons:

a. The 5.3% productivity factor better reflects current and forward-looking telecommunications trends and continued declining industry costs which are equally applicable to local and interstate services.

b. There is no evidence the 5.3% productivity offset would not encourage efficiency and promote investment.

8. Determination of an appropriate productivity offset is difficult. As CURB notes the evidence ranged from a low of 1.25% to above 5%. The Commission finds that the record evidence does not support a productivity offset in the upper part of the range. Evidence was clear that the difference in growth rates between interstate access service to which the 5.3% offset applies and local services is significant. The Commission further notes that the FCC revises the interstate offset yearly. In its reconsideration petition SWBT provides a thorough analysis of the record in light of new information. The Commission specifically notes the recent increase in the cost of fiber optic cable in view of the requirement of K.S.A. 1996 Supp. 66-1,187(q) to link central offices with fiber optic cable or the technological equivalent. CURB's petition reiterates arguments rejected in the Order. CURB claims there is no evidence demonstrating that a 5.3% X-factor will not promote efficiency and investment, but cited to no evidence that it will.

9. On the basis of SWBT's petition the Commission believes that the 3% X-factor may be too high for the price cap methodology, particularly when considering the infrastructure requirements imposed by the state legislation. The Commission notes that SWBT's petition also documents recent price increases by interexchange carriers, which must be a result of increased cost.

10. Staff's memorandum recommended that the Commission set the X-factor in the 2.2-2.5% range. The evidence shows that the average X-factor is 2.2% in

states with an infrastructure investment requirement. Weisman Tr. 2102. Since 2.2% is the average, states have clearly set both higher and lower factors. The Commission does not believe that the evidence justifies a lower X-factor. It should be set so as to provide a challenge to the company to be as efficient as possible. SWBT witness Bernstein in his rebuttal exhibit 2 established an LEC average X-factor of 2.5% and an X-factor for the economy in general of 0.2%, resulting in a total factor productivity differential of 2.3%. The Commission finds that 2.3% is an appropriate X-factor and grants SWBT's reconsideration petition to lower the X-factor, while denying CURB's petition to increase it.

11. Basket Three Subbaskets: AT&T requests the Commission to reconsider its decision not to group Basket Three services in subbaskets with individual price caps. AT&T asserts the price cap mechanism acts as a revenue cap allowing for cross subsidization of the more competitive services by monopoly services, because the basket contains competitive/discretionary and monopoly/essential services. Establishment of a limited number of subbaskets would preclude cross-subsidization which erects economic barriers to competition in violation of the Federal Act.

12. There was considerable evidence provided regarding grouping of Basket Three services in subbaskets. The Commission considered this evidence in its initial decision. The Commission is mindful of the potential for cross subsidization. To guard against the possibility of cross subsidization, the Commission created the Competitive SubBasket, into which competitive services

may be moved. Those competitive services will then be subject to a separate price cap and price floor. Staff's Memorandum recommended that this measure was sufficient to protect against cross subsidization.

13. The Commission finds that the services in Basket Three, with some exceptions, are competitive in nature or optional. The Commission therefore sees less need to constrain their pricing. The establishment of the competitive services subbasket, with its separate price cap and price floor is sufficient to guard against cross subsidization. The Order is affirmed with respect to this issue.

14. Guidelines for Reducing Regulation: SWBT asserts the order does not establish guidelines for reducing regulation as required by Section 6(m) (K.S.A. 1996 Supp. 66-2005(m). SWBT argues that the competitive flexibility plan established by the order does not provide a clear road map to deregulation for LECs to follow. SWBT asserts the competitive flexibility plan will require multiple hearings on a single issue--the competitiveness of each service in each exchange--and that it will increase rather than decrease the regulatory burden.

15. In its Memorandum Staff advised the Commission it believes SWBT misunderstands the competitive flexibility plan. A price cap regulated company may petition for inclusion of a service in the competitive subbasket on a statewide basis and also for a group of services in one particular exchange (defined in paragraph 64). Staff informed the Commission it does not anticipate that hearings would be required in most instances. Staff believes the plan meets the requirements of the legislation.

16. The Commission agrees with Staff that the competitively flexible plan, not only is intended to allow price cap regulated companies the necessary flexibility in an increasingly competitive business environment, but will in fact operate to provide that flexibility. Staff's interpretation of how the plan is intended to operate is correct. The Commission certainly does not anticipate holding hearings on every service in every exchange. The Commission finds that the plan complies with the law and will have the intended effect of reducing regulation of services that are in transition to deregulation. The order is affirmed.

B. KUSF

17. Business Lines: Columbus asserts the Commission should allow KUSF funding for business lines. Columbus argues business lines should be included because LEC access rates provide support for costs associated with both residential and business lines. Columbus also states the Federal Act requires comparable services in rural and urban areas at comparable prices. Columbus argues if business lines are not included, cost-based rates for urban business lines will not be comparable to cost-based rates for rural business lines. Columbus also asserts KUSF funding for business lines is in the public interest because businesses have the same health and safety needs as residential customers, pass-through of costs for business lines to business customers will be a disincentive to economic development, and increasing the cost of business service is not an appropriate way to protect rural companies from cherry picking. AT&T argues the Commission should allow KUSF funding for business lines. AT&T generally agrees business service rates should be

based on cost. However, AT&T asserts SWBT will be able to internally subsidize rates and states the denial of KUSF funding for business lines is discriminatory.

18. The incumbent companies remain revenue neutral with respect to the access rate rebalancing. They lose no support for current lines in service. The question is whether a net gain in business lines should qualify for a per line subsidy. The Commission was advised that the Joint Board in the federal universal service proceeding recommended universal service funding for one residential and one single line business line. The Commission believes the KUSF was designed to assure that all Kansans have access to universal service at an affordable price and was not intended to provide subsidies to businesses, especially not large businesses which require more than a single line. The Commission finds, however, the arguments presented justify KUSF funding for single line business lines at least until the FCC's universal service funding decision is issued and its impact is assessed. Single line business lines qualify for a $3.50 EUCL, as do residential lines in the federal jurisdiction. The Commission believes the KUSF was not enacted to promote economic development and that it would be inappropriate to require telephone companies and customers to fund economic development on the basis of rates for service. Therefore, the Commission grants the requested relief to the extent set forth above.

19. Kansas Universal Service Fund Mechanism: AT&T, K.C. Fiber and CURB assert the universal service mechanism does not consider the cost of providing universal service, but merely spreads the access reductions across all

providers and does not address the inherent problem in the industry of the lack of a relationship between cost and prices. They further assert that the Federal Act prohibits cross subsidization of competitive services by non-competitive services by mandating the state to establish cost allocation rules, accounting safeguards and guidelines to insure services in the universal service definition bear no more than a reasonable share of joint and common costs of facilities to provide those services. Section 254(k). These parties contend the historic imbalance between price and cost needs to be corrected with the advent of competition and implicit subsidies must be removed. Failure to examine the relevant cost of providing local service makes it impossible to determine implicit subsidies and has resulted in a universal service mechanism which deprives the ALECs of a source from which to draw a subsidy to provide competitive local exchange service. AT&T asserts that"there was no dispute regarding the fact that prices for local service are below cost in certain areas of the state. . ." (p.4) CURB asserts "there is no significant or overall subsidy of basic local residential rates[.] " and that SWBT's incremental costs of residential basic local service were overstated by some material amount. (p.6) AT&T and K.C. Fiber assert that failure to examine relevant cost of providing local service has led to an improperly sized KUSF, depriving the ALECs of a source from which to draw a subsidy to provide competitive local exchange service. K.S.A. 1996 Supp. 66-2008(d) directs the Commission to review the costs of providing local service.

20. CURB has cited to cost study evidence presented by it. Cost study evidence was also presented by SWBT and to some extent by Staff. SWBT's

evidence shows that the company's total local exchange cost is $ 306 million. Cooper Tr. 2151-9. If this amount is spread on a per line basis, it shows that each line would need to recover $34.50 per month to cover its local exchange cost. In order to constitute a subsidy the local service rate, including the EUCL and the CCL for inter and intrastate access would need to exceed $34.50. There is no evidence in the record that these charges do so. General knowledge leads the Commission to believe they do not. The Commission acknowledges this calculation averages costs and revenues and does not reflect cost/price relationship in discrete areas. Neither the Federal Act nor the State Act contain requirements that the Commission undertake a restructuring of local service rates.

21. Although AT&T, CURB and K.C. Fiber complain in general that the KUSF is not based on cost and does not follow federal law, they do not cite to evidence indicating the decision lacks a basis in the record. The burden is on the party seeking reconsideration to cite to evidence. K.A.R. 82-1-235. The Commission is not required to search the record for evidence supporting reconsideration.

22. With respect to Section 254(k) of the Federal Act, the Commission has established accounting safeguards to preclude cross subsidization by implementation of the price cap plan, the competitive services subbasket and the imputation requirement. The access charge reduction operates to remove implicit subsidies.

23. Sections 254 (e) and (f) of the Federal Act generally require compliance with FCC guidelines for the federal universal service mechanism, an order on which will not be issued until May. They allow adoption of state mechanisms that

are not inconsistent with the FCC rules and require that state mechanisms not rely on or burden the federal mechanism. The Commission will need to evaluate the KUSF for consistency with the FCC order, but obviously cannot make the necessary determinations until the FCC has acted. Sections 251 and 252 have also been cited. They address cost based determinations of interconnection issues. They do not require the Commission to restructure local service prices.

24. K.S.A. 1996 Supp. 66-2008(d) requires the Commission to review the KUSF "periodically" to determine if the costs to provide local service justify modification of the KUSF. However, K.S.A. 1996 Supp. 66-2008(a) requires that incumbent LECs be revenue neutral. The initial amount of the KUSF must be determined in the manner set out in the order. The evidence supports the decision and the order is affirmed.

25. KUSF Distributions: AT&T asserts the Order confuses access rate rebalancing and the KUSF. AT&T states under K.S.A. 1996 Supp. 66-2005(c), only access rate rebalancing is required to be done in a revenue neutral manner. AT&T also comments that K.S.A. 1996 Supp. 66-2008(c) requires that KUSF contributions be competitively neutral. AT&T argues that K.S.A. 1996 Supp. 66-2008(c) was not intended as a revenue neutral, make-whole provision for the LECs.

26. The Commission has ordered no rate rebalancing although it is authorized by K.S.A. 1996 Supp. 66-2005(c). K.S.A. 1996 Supp. 66-2008(c) addresses distributions from the KUSF, not contributions to the fund. The Commission agrees that both distributions and contributions to the KUSF must occur in a

competitively neutral manner. The Commission finds that the order establishes a competitively neutral distribution and contribution methodology. However, K.S.A. 1996 Supp. 66-2008(a) requires the initial KUSF amount to be comprised of revenues lost through access charge and toll reductions. The Commission denies reconsideration of this issue.

27. Funding Methodology: K.C. Fiber and CMT assert the KUSF funding methodology is discriminatory and a barrier to entry. K.C. Fiber states all companies providing local exchange service in competition with incumbent LECs must contribute 14.1% to the KUSF while the LECs do not. K.C. Fiber also states the local service wholesale discount to ALECs would be based on the local rate increased by the KUSF assessment pass-through.

28. The Commission recognizes that confusion regarding the KUSF funding methodology exists and wishes to clarify the methodology set out in its Order. All providers of intrastate telecommunications services, including incumbent LECs, will be subject to the same KUSF assessment. K.S.A. 1996 Supp. 66-2008(b) authorizes all contributors to pass through the assessment to their customers. No company is required to pass the assessment through. However, if a LEC decides to pass the assessment through to its customers, the Commission established a method the incumbent LECs must use for doing so. Even if a company passes the assessment through in the form of higher prices for local service, the assessment does not constitute a local service rate increase. It remains a KUSF assessment, which may vary from year to year. Any wholesale discounts from local

service prices will be based on the local service price without the KUSF assessment. As stated in the order, the Commission did not order rate rebalancing. Thus, local service rates remain the same as before the assessment, regardless of the manner in which the assessment is passed through. Independent LECs that increase their local rates to reach statewide average rural rates as authorized by K.S.A. 1996 Supp. 66-2005(d) will of course include any such increases since they are an integral part of the local rate and not a separate assessment. The Commission finds the funding mechanism is not a barrier to entry because it is funded through the same assessment on all contributors and the wholesale rate is not affected by the assessment. Therefore, the Commission denies reconsideration of this issue.

29. Subsidy Amount: AT&T asserts $36.88 is meaningless for any loop in SWBT territory because SWBT receives no federal universal service funding support. AT&T also states no evidence exists which indicates the $36.88 will cover the cost of an unbundled loop. Sprint seeks clarification of how the $36.88 and recovery from customers will impact the incumbent LEC's total KUSF support. K.C. Fiber asserts that limiting ALEC recovery to $36.88 violates K.S.A. 1996 Supp. 66-2008(c).

30. K.S.A. 1996 Supp. 66-2008(a) requires that incumbent LECs remain revenue neutral. The $36.88 loop cost support payment will help insure the independent LECs remain revenue neutral. The $36.38 was determined to be the loop cost needed to be funded by the KUSF by considering the average loop cost and federal universal service funding support. Parties expressed concern regarding

KUSF support for rural areas when the LEC in not eligible for universal service funding support. Several small incumbent LECs do not receive federal universal service funding support because their service territory is not "high cost." For SWBT, the high rural area cost per loop has been averaged with the many loops in the metropolitan areas resulting in ineligibility for federal universal service funding support. The Commission has established a generic docket 97-SCCC-149-GIT to investigate cost studies. In the cost study docket, cost of facilities will be determined in order to set prices for interconnection. The loop cost for different density zones will be determined. Staff recommended that the level of loop cost support in rural areas be incorporated into the generic cost study docket. The Commission, therefore, denies reconsideration of this issue and incorporates consideration of loop cost support in the generic cost study docket.

31. In its Comments on Petitions for Reconsideration SWBT raised the issue of inclusion of the KUSF assessment in revenue determinations for municipal fee assessments. The Commission directs companies using the Uniform System of Accounts, Part 32, to book the KUSF assessment revenues in Account No. 5264. Consistent with other determinations in this order the KUSF assessment is not a part of the rate for local service.

C. KANSAS LIFELINE PROGRAM

32. CURB asserts the Lifeline Program is inadequate in light of rate increases LECs may charge. The Commission disagrees. The $3.50 discount exceeds increases customers will bear if companies decide to pass through KUSF

assessments. Furthermore, the Lifeline Program is the first of its kind in Kansas and will allow customers to become eligible for a federal lifeline matching amount that will double support payments customers receive. If the FCC significantly alters the federal program, the Commission may revisit the issue. The Order is affirmed with respect to this issue.

D. RURAL GUIDELINES

33. Columbus claims the Commission failed to "follow the mandate of the Kansas Act in establishing rural guidelines." The Commission adopted rural entry guidelines which enumerated the statutory requirements for rural entry. (Order ¶ 175, Attachment B). The State Act requires the Commission to adopt guidelines to ensure all telecommunications carriers and local exchange carriers preserve and enhance universal service. The Commission may issue a certificate to provide service in a rural telephone company exchange area if the application meets the guidelines issued pursuant to K.S.A. 1996 Supp. 66-2004(b) and other relevant criteria. K.S.A. 1996 Supp. 66-2004(d). Any decisions regarding rural entry must be made on a case-by-case basis.

34. Columbus proposes the following guidelines be considered when an applicant requests authority to provide service in a rural telephone service area:

- proposed competitive entry would not negatively effect preserving and advancing universal service, at reasonable and affordable rates and with high service quality, in the incumbent service area;

- competition pursuant to the application would not negatively effect the continued existence of a viable carrier of last resort, capable of providing high quality, affordable required telecommunications services to anyone in the service area on request;

- the service area of the incumbent rural telephone company is capable of sustaining more than one telecommunications service provider;

- the new entrant into a rural telephone company service area will provide, operate and maintain high capacity facilities and services to schools, medical facilities, and libraries;

- the new entrant should satisfy the Commission that it will not violate the intent of the law and will provide service throughout the service area of the rural telephone company;

- accommodating multiple telecommunications service providers in the rural telephone company service area must be technically feasible; and

- the economic burden of implementing measures necessary to effect these technical requirements must not be excessive or unreasonable.

35. Columbus submits that the guidelines must be established *by the applicant* before a company could be certificated to offer service in a rural telephone company's service area. It appears Columbus intends that the applicant bear the burden of proof. The Federal and State Acts state the Commission must make a determination that the request is not unduly economically burdensome, is technically feasible and preserves and enhances universal service (Section 254 of the Federal Act). The burden of proof does not appear to be assigned to either party.

36. The Commission finds that the guidelines proposed by Columbus shall be adopted to the extent such guidelines are not preempted by Federal law and are consistent with State law. Consistent with Federal and State law, the prefatory language included by Columbus placing the burden of proof on the applicant is not incorporated into the Commission guidelines. Columbus' petition for

reconsideration is granted in part, to the extent that the proposed rural entry guidelines are adopted as modified herein.

E. CELLULAR CONCERNS

37. Notice: CMT alleges it did not receive adequate notice of these proceedings. CMT concedes that everyone is presumed to know the law, but challenges notice regarding the Commission proceeding.

38. K.S.A. 1996 Supp. 66-2002(h) and 66-2008(b) state the Commission must establish the Kansas universal service fund on or before January 1, 1997. K.S.A. 1996 Supp. 66-2008(b) also states the Commission "shall require every telecommunications carrier, telecommunications public utility and wireless telecommunications service provider that provides intrastate telecommunications services to contribute to the KUSF. . . " H.B. 2728 put the wireless service providers on notice that a proceeding would be conducted before the Commission and completed prior to January 1, 1997.

39. Notice of the hearing was published in newspapers of general circulation throughout Kansas. All telephone companies were required to provide notice in the form of billing inserts to all customers. (Order ¶ 99) The published notice and the billing inserts stated that '[a]ll companies providing any form of telecommunications service in the state will pay into [the universal service] fund." Additionally, the notice stated the time and place of the technical hearing.

40. In addition, Staff, in early July, 1996, mailed a request to all cellular carriers known by Staff to be providing service in the state of Kansas. The request